90-1874

Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN RE: ARTHUR COURNOYER,

Petitioner,

PETITION FOR AN EXTRAORDINARY WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND

ROBERT D. POWELL
LAW OFFICES OF
ROBERT D. POWELL, P.C.
2033 M Street, N.W.
Suite 703
Washington, D.C. 20036
(202) 223-5140
Attorney for Petitioner.

June 4, 1991

QUESTION PRESENTED

DID THE SUPERIOR COURT OF RHODE ISLAND VIOLATE PETITIONER'S RIGHTS UNDER THE 14 TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY ORDERING THE DESTRUCTION OF NON-OFFENDING FIXTURES AND PERSONAL PROPERTY LAWFULLY PLACED ON HIS REALTY AS A METHOD OF ENFORCING A CONTEMPT DECREE, WITHOUT HOLDING A HEARING SPECIFICALLY FOCUSED ON THE VALIDITY OF THOSE ITEMS BEING ON PETITIONER'S PROPERTY?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES . . . . . ii-iii
REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS 2, 1a-19a
JURISDICTION 1
CONSTITUTIONAL PROVISION INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR ALLOWING THIS REQUEST FOR ISSUANCE OF EXTRAORDINARY WRIT 5
CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

Avery v. Midland County, Texas, 390 U.S. 474, 20 L.Ed.2d 45, 86 S.Ct. 1114 (1968) 6

Brinkerhoff-Faris Trust and Savings v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 451 (1930) 6, 7

Deauville Associates, Inc., v. Eristave Tchitcherine, 173 F.2d 745 (5th Cir. 1949) 7

De Beers Consol. Mines v. U.S., 325 U.S. 212, 89 L.Ed. 566, 65 S.Ct. 1130 (1945) 8

Ex Parte Fahey, 332 U.S. 258, 91 L.Ed. 2041, 67 S.Ct. 1558 (1947) 6

Far East Conf. v. U.S., 342 U.S. 570, 96 L.Ed. 576, 72 S.Ct. 492 (1952) 6

Herbert v. State of Louisiana, 272 U.S. 312, 47 S.Ct. 103 (1926) 8

House v. Mayo, 324 U.S. 42, 89 L.Ed. 739, 65 S.Ct. 517 (1945) 6

Cases, continued: Page

Hovey v. Elliot, 167 U.S. 407, 42 L.Ed. 215, 17 S.Ct. 841 (1897). 7

In re 620 Church St. Bldg., 299 U.S. 24, 81 L.Ed. 16, 575 Ct. 88 (1936) 6

Ohio Citizens for Responsible Energy v. NRC, 479 U.S. 1312, 93 L.Ed.2d 692, 107 S.Ct. 682 (1986) 5

Statutory Provisions, and the Constitution of the United States:

1. Section 1, Amendment 14 to the Constitution of the United States 2

2. 28 U.S.C. 1651(a) 1

APPENDICES:

Appendix A – Order of the Honorable Justice Giannini, April 29, 1991 . . . . . 1a

Appendix B – Order of the Supreme Court of Rhode Island, March 28, 1991. . . . . 3a

Appendix C – Order of the Honorable Justice Giannini, March 11, 1991. . . . . 4a

Appendix D – Supplemental Order, Honorable Justice Giannini, March 11, 1991 . . . . . 7a

Appendix E – Order of the Honorable Justice Giannini, February 20, 1991. . . . . 9a

Appendix F – Order of the Supreme Court of Rhode Island, November 16, 1990 . . . . . 11a

Appendix G – Decree of the Honorable Justice Giannini, February 22, 1990. . . . . 13a

Appendix H – Decree of the Honorable Justice Giannini, February 21, 1990. . . . . 16a
w/attached transcript pages from hearing of February 21, 1990. . . . . 17a-19a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN RE: ARTHUR COURNOYER,

Petitioner,

PETITION FOR AN EXTRAORDINARY WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND

JURISDICTION

Jurisdiction of the Court is invoked under 28 U.S.C. 1651 (a). This Petition seeks the issuance of the extraordinary writ of certiorari under said section, directed to the orders of the Superior Court of Rhode Island, dated February 20, 1991, and March 11, 1991, which order, in part, the demolition of Petitioner's garage, and demolition or removal and sale of his house trailer, and the removal and sale of his duly registered vehicles, directing that review of said matters be brought directly before this Court.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner relies on a portion of Section 1 of the 14th Amendment to the Constitution of the United States, to wit:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner's history with the Town of Lincoln, Rhode Island, extends back to 1958, and marches through a massive amount of litigation. See *Cournoyer v. ZBR of Lincoln*, 92 R.I. 42, 166 A.2d 128 (1960); *Town of Lincoln v. Cournoyer*, 95 R.I. 20, 186 A.2d 728 (1962); *Town of Lincoln v. Cournoyer*, 102 R.I. 512, 232 A.2d 124 (1967); *Cournoyer v. Sharkey*, 107 R.I. 373, 267 A.2d 722 (1970); *Town of Lincoln v. Cournoyer*, R.I. 290 A.2d 600 (R.I. 1976); *Town of Lincoln v. Cournoyer*, –R.I.–, 375 A.2d 410 (R.I. 1977); *Town of Lincoln v. Cournoyer*, –R.I.– (Appeal #90-145A, summarily dismissed November 16, 1990). All this litigation stems from a Town Zoning Ordinance placing Petitioner's land in a residential zone, after it had been used for many years in a commercial enterprise, a junk yard for truck parts. Petitioner, in response to the Town's initial attempt to enforce its newly enacted ordinance, claimed "grandfather" rights. Somehow, these rights were waived, and a consent decree was passed in which Petitioner was

alleged to have agreed to conform his use of his property to the ordinance.

Throughout this litigation, Petitioner has claimed that he had never authorized the original consent decree of 1958, which consented to his waiver of his "grandfather rights" under the Town of Lincoln's zoning ordinance so assiduously enforced since 1958. He has never had a hearing on that claim, and all parties involved at the time in 1958, are deceased, save Petitioner.

Petitioner was incarcerated at least five times for contempt of court for failing to clear junked trucks and parts from his property. These parts have repeatedly been cleared off the land, and sold, the proceeds going to pay for administrative expenses. After the fifth imprisonment, the property was entirely cleared of all property in conformance with the Town's Zoning Ordinance. It is cleared as of this day.

As part of the Superior Court's order of February 22, 1990, for the stated purpose of depriving Petitioner of ever again being able to defy a Court order regarding his non-conforming use of his property (See Appendix H), Petitioner was ordered to remove from his property his house trailer, his garage, and several lawfully registered vehicles. The garage was built on Petitioner's property pursuant to a lawful building permit. Petitioner attempted to introduce the permit into evidence, but no hearing was conducted concerning its validity. Neither the Town of Lincoln nor any of the Petitioner's neighbors had complained about the garage. Petitioner's house trailer was upon his property and served as his home prior to any ordinance precluding it. He obtained and sought to introduce affidavits to that effect, but no hearing was ever held concerning this alleged pre-existing usage. No one had ever complained about the house trailer.

Finally, Petitioner maintains four registered vehicles on his property, that may not be classified as "junk" or "scrap," and these have not been complained of by the Town or his neighbors, yet the order requires their removal and sale.

It should also be noted that Petitioner was sentenced to serve six months at the Adult Correctional Institute of Rhode Island for Contempt of Court on February 22, 1990, sentence suspended. The suspension was vacated on March 11, 1991, and he began serving that sentence on that date. He was released on his own recognizance on May 9, 1991. An application for a writ of Habeas Corpus, filed in the U.S. District Court for Rhode Island, was denied on May 30, 1991, the stated grounds being that petitioner had not yet exhausted all of his state court remedies, as the appeal referenced below is pendding. The District Court did not reach the merits of the case.

Petitioner sought a stay of the Superior Court's Order, as it pertained to these items of property referred to above, seeking a hearing on his rights under Section 1, Amendment 14 to the U.S. Constitution. The Superior Court refused to stay its order, but authorized that the subject be briefed. Petitioner and counsel for the Town of Lincoln submitted briefs. Petitioner sought only a hearing to provide him with an opportunity to be heard on the validity of the placement of his garage, house trailer, and vehicles. The Court denied additional hearings, ruling the matter *res judicata*, although no specific hearing on the subject had ever been held. An application for an interlocutory stay was made to the Supreme Court of Rhode Island. Its ruling was that a stay would not issue, as the matter was *res judicata*.

Petitioner has appealed the Superior Court's Orders of February 20, 1991, and March 11, 1991, to the Supreme Court of Rhode Island. In addition to his Section 1, 14th Amendment rights, Petitioner will assert in that court rights under the 4th and 9th Amendments to the Constitution. Given its ruling on Petitioner's stay request, there is no doubt that the Supreme Court of Rhode Island will dismiss Petitioner's appeal.

Petitioner presented an application for injunctive relief to Justice Souter, on May 17, 1991, Case No. A-869, which application was denied on May 18, 1991.

REASONS FOR ALLOWING THIS REQUEST FOR ISSUANCE OF AN EXTRAORDINARY WRIT

With Justice Scalia's decision and caution in *Ohio Citizens for Responsible Energy, Inc., v. NRC*, 479 U.S. 1312, 93 L.Ed.2d 692, 107 S.Ct. 682 (1986), squarely in mind, as well as Rule 20 of this Court's Rules, it is submitted that absent the issuance of a writ of certiorari herein, Petitioner's lawful residence will be destroyed or sold; his garage, a lawful fixture on his property, will be destroyed, and his lawfully registered vehicles, used by him in his business, will be sold. The *res* that would be the basis for review by this Court of the what would no doubt be the ultimate and negative decision of the Supreme Court of Rhode Island, would no longer exist. Should this Court ultimately find the state actions below unconstitutional, the decision would be of little solace to the Petitioner. He would be left with an invitation toward further litigation, and little more, and confront a hardship in awaiting the finalization of the appeal process. *United States Alkali Export Association v. U.S.*, 325 U.S. 196, 89 L.Ed. 1554, 65 S.Ct. 1120 (1945).

This Court clearly has authority to resort to the common law writ of certiorari, in aid of its jurisdiction,

United States Alkali Export Ass'n, supra; Far East Conference v. U.S., 342 U.S. 570, 96 L.Ed. 576, 72 S.Ct. 492 (1952); *House v. Mayo*, 324 U.S. 42, 89 L.Ed. 739, 65 S.Ct. 517 (1945); *In re 620 Church St. Bldg.*, 299 U.S. 24, 81 L.Ed. 16, 57 S.Ct. 88 (1936), especially when Petitioner will suffer great harm awaiting the appeal process to be fulfilled. *Alkali Export Ass'n., supra.* Moreover, at this juncture, given the ruling of the Supreme Court of Rhode Island on Petitioner's request for a stay, it is safe to say that the sole appellate relief available to Petitioner on the important constitutional issues raised herein will be in this Court. Under these extraordinary circumstances, where an appeal in a state court is manifestly inadequate, the extraordinary relief herein requested is warranted *Ex Parte Fahey*, 332 U.S. 258, 91 L.Ed. 2041, 67 S.Ct. 1558 (1947).

Section 1 of the 14th Amendment clearly applies to the issues at hand, including actions of the Rhode Island judiciary. *Brinkerhoff-Faris Trust and Savings v. Hill*, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 451 (1930); *Steel Corp. v. Glander*, 337 U.S. 562, 93 L.Ed. 1544, 69 S.Ct. 1291 (1949); *Avery v. Midland County, Texas*, 390 U.S. 474, 20 L.Ed.2d 45, 86 S.Ct 1114 (1968).

In the instant case, Petitioner submitted to the Rhode Island courts that all offending property had been cleared from his realty prior to the Superior Court's orders of February 20 and March 11, 1991. An order had been passed one year prior, on February 22, 1990, dealing with his house trailer, garage and vehicles, which he believed were not covered by orders of years passed, and which dealt with property not offensive to anyone. The stated purpose for including the garage, trailer, and vehicles was to insure that Petitioner did no further business

BEST AVAIL

on his property (See Appendix H). But they were lawfully on his property, and have uses other than business uses. He asked to be heard on this specific issue, as recently as March 1991, but found the courthouse doors closed to him. In effect, his property is being taken from him, destroyed, or will be sold, as part of the contempt process, without specific hearing or process, in direct violation of this Court's holding, limited to its facts, of *Hovey v. Elliot*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897). Also see *Brinkerhoff-Faris Trust and Savings v. Hill*, wherein Justice Brandeis, speaking for the Court, said

> whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. (281 U.S. 673, at 682).

A court should not prescribe, as a means to enforce its orders, that its doors be closed to one in contempt in defense of either his liberty or property. *Deauville Associates, Inc., v. Eristave Tchitcherine*, 173 F.2d 745 (5th Cir. 1949).

The enforcement of the Rhode Island Court's Order would fall squarely within this caveat, and the *Hovey* prohibitions. In the instant case, without regard to Petitioner's constitutional rights, the Superior Court sought to enforce its orders by means other than fines or imprisonment, without proper process. This was inappropriate and beyond the Court's judicial power, *Deauville Associates, supra.* When a court so acts beyond its judicial power, its actions exemplify not mere error, but a usurpation of power. It is this sort of a situation that

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calls for the application of section 1651. *De Beers Consol. Mines v. U.S.*, 325 U.S. 212, 89 L.Ed. 566, 65 S.Ct. 1130 (1945).

> The due process clause of the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires, nor does it enable this court to reverse the decisions of the State Courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice, which lie at the base of all our civil and political institutions. *Herbert v. State of Louisiana*, 272 U.S. 312 (1926), at p. 316.

CONCLUSION

Petitioner asks for the issuance of an extraordinary writ of certiorari bringing the issue of the Superior Court of Rhode Island's actions with respect to his constitutional rights directly before this Court. In effect, Petitioner asks only for due process of law.

Respectfully submitted,

ROBERT D. POWELL
Attorney for Arthur Cournoyer

June 4, 1991

APPENDIX A

STATE OF RHODE ISLAND
PROVIDENCE, SC. SUPERIOR COURT

EQUITY NO. 26210

TOWN OF LINCOLN

VS

JOSEPH A. COURNOYER

ORDER

This matter came to be heard before the Court, the Honorable Justice Giannini presiding, upon respondent's hearing concerning constitutional issues. The issues were submitted on memorandum by the respondent and petitioner replied. The memoranda were supplemented by oral argument on April 29, 1991. After hearing thereon and consideration thereof, it is hereby

ORDERED as follows:

1. Respondents' request to present memoranda of law concerning constitutional issues having been granted and heard shall further be treated as a motion to reconsider and amend the Court's order dated February 20, 1990.

2. As such, respondent's motion to reconsider and amend is denied.

3. In doing so, the Court finds that the Supreme Court Order dated November 16, 1990 rendered final all issues relative to the arguments presently argued.

4. Had said arguments been presented to the Superior Court prior to the Court's order dated February 20, 1990 the Superior Court would have found Mr. Cournoyer's constitutional rights not to have been violated by the process followed in this case.

BY ORDER

_____

ENTER

_____

Justice of the Superior Court

PRESENTED BY:

/s/ James P. Marusak

James P. Marusak
GIDLEY, LOVEGREEN & SARLI
70 Westminster Street
Providence, Rhode Island 02903

APPENDIX B

SUPREME COURT OF RHODE ISLAND

No. 91-132-A.

Town of Lincoln

v.

Joseph Courmoyer.

ORDER

The defendant's motion to stay the order of the Superior Court entered in this matter on March 11, 1991 is denied. The Special Master's motion to remand the papers in this matter to the Superior Court for hearing scheduled for April 2, 1991 is granted. Following said hearing the papers shall be returned to this court forthwith.

Mrs. Justice Murray did not participate.

Entered as an Order of this Court this 28th day of March 1991.

By Order,

/s/ Beverly A. Clark per

Matthew J. Smith
Clerk

APPENDIX C

STATE OF RHODE ISLAND
PROVIDENCE, SC. SUPERIOR COURT

Equity # 26210

TOWN OF LINCOLN

VS.

JOSEPH A. COURNOYER, ET AL.

ORDER

This matter came to be heard before the Superior Court, Mr. Justice Gianinni presiding, on March 11, 1991, upon continuation of the Status Hearing of February 15, 1991.

After hearing thereon and consideration thereof it is hereby

ORDERED, as follows:

1. The suspension of the six month sentence imposed on February 15, 1991 is hereby vacated; the Respondent having failed to remove the violating vehicles, structures and materials as ordered.

2. The Respondent is ordered to serve six months in the Adult Correctional Institution.

3. At the request of the Respondent's counsel the hearing on the Special Masters request for payment of his fees from funds on deposit in the Registry of the Court is hereby continued to April 1, 1991 at 10 a.m.

4. The Special Master is ordered to make arrangements for the demolition of the garage; the sale of all materials and vehicles in the garage; the sale of all vehicles and plows now on the premises with the exception of the Respondent's passenger vehicle and the removal or demolition of the house trailer present on the premises.

5. The Respondent is assessed, and shall remain responsible to pay for, all costs and fees incurred in the prosecution of this Order and all other prior Orders of the Court.

6. In order to obtain the services to be engaged and the goods to be sold at appropriate values, the Special Master is directed to seek said services and sales by competitive bidding where feasible.

7. The Special Master is directed to advertise for a contract or contracts for services for the demolition and/or removal of the garage and trailer and to advertise for the sale of the contents of the garage and all other vehicles and items noted above. The Special Master shall endeavor to solicit at least three (3) competitive bids for the items of service and sale which bids shall be opened and awarded in open Court on a date certain to be selected by the Special Master. The Master shall retain the right to reject all bids and to go onto the open market with the approval of the court for good cause shown.

8. To effectuate prompt payment for any and all services and fees incurred pursuant hereto, the proceeds of any sale of goods and the amounts now on deposit with the Registry of the Court shall first be applied. If the costs and fees exceed said amount recovered and on deposit, then the excess shall be paid by the Town of Lincoln. Any amounts so expended by the Town shall be added to the amounts constituting a continuing lien upon the Respondent's property. All sums due to the Town of

Lincoln may ultimately be recouped pursuant to foreclosure and sale of the Respondent's property after further hearing by the Court.

9. The Respondent's request to present Memoranda of Law concerning constitutional issues is granted. Respondent shall present any such memorandum on or before March 22, 1991 and the Petitioner shall submit its reply on or before April 10, 1991.

10. The Respondent's request for a stay of implementation of this Order is denied.

BY ORDER

/s/ Shirley A. Connelly, Asst. Clerk

ENTER

/s/ Giannini, P.J./Rel.)
Justice of the Superior Court

Dated: March 15, 1991

Presented by

/s/ James P. Marusak

James P. Marusak
GIDLEY, LOVEGREEN & SARLI
170 Westminster Street
Providence, RI 02903

APPENDIX D

STATE OF RHODE ISLAND
PROVIDENCE, SC. SUPERIOR COURT

Equity # 26210

TOWN OF LINCOLN

VS.

JOSEPH A. COURNOYER, ET AL.

SUPPLEMENTAL ORDER

This matter came to be heard before the Superior Court, Mr. Justice Gianinni presiding, on March 11, 1991, upon Respondent's Motion to clarify paragraph #4 of the Order submitted by the Special Master and dated February 20, 1991.

After hearing thereon and consideration thereof it is hereby

ORDERED, as follows:

That paragraph #4 of the Order submitted by the Special Master on or about February 20, 1991 is hereby supplemented to reflect the clear intent of the Bench decision issued on February 15, 1991 which intent was plainly made known to all parties at that time.

As further detailed in said Bench Decision, by directing the Respondent "to clean up his property" the Court required Mr. Cournoyer to remove all vehicles from his

premises other than his personal passenger vehicle, as well as all other structures and materials delineated in the Order.

BY ORDER

/s/ Shirley A. Connelly, Asst. Clerk

ENTER

/s/ Giannini, P. J. (Ret.)
Justice of the Superior Court

Dated: March 15, 1991

Presented by:

/s/ James P. Marusak
James P. Marusak
GIDLEY, LOVEGREEN & SARLI
170 Westminster Street
Providence, RI 02903

APPENDIX E

STATE OF RHODE ISLAND
PROVIDENCE, SC. SUPERIOR COURT

EQUITY NO. 26210

TOWN OF LINCOLN

VS.

JOSEPH A. COURNOYER, et al.

ORDER

This matter came on to be heard before Judge Giannini, Presiding Justice of this Court, on February 15, 1991, upon status hearing and upon the Special Master's request for payment of his fees from the funds on deposit in the Registry of the Court; and after hearing thereon and consideration thereof, it is hereby

ORDERED

1. That Respondent is adjudged to be in civil contempt of the Orders of the Superior Court.

2. Respondent is hereby sentenced to serve a term of six months at the Adult Correctional Institution.

3. The purpose for the sentence is to get the Respondent to clean up his property.

4. Respondent is directed to clean up his property, to tear down the garage, and to remove the house trailer. If these are done by March 8, 1991, Respondent will not go to jail.

5. The sentence of six months for civil contempt is hereby suspended to see what the Respondent does about this matter by March 8, 1991.

6. This matter is continued to March 8, 1991, at 10:00 a.m. for a status hearing.

7. The request for payment of fees by the Special Master shall be considered by the Court at the continuation of this hearing on March 8, 1991, at 10:00 a.m.

By order,

/s/ Illegible
Deputy Clerk 2-20-91

ENTER:

/s/ Giannini, P. J.
Presiding Justice of the
Superior Court

DATED: February 20, 1991

PRESENTED BY:

/s/ Joseph T. Little
JOSEPH T. LITTLE, ESQUIRE
Special Master
225 Waterman Avenue
P.O. Box 14198
East Providence, RI 02914
434-3800

APPENDIX F

SUPREME COURT OF RHODE ISLAND

No. 90-145-Appeal.

Town of Lincoln

v.

Joseph A. Cournoyer, et al.

ORDER

This case came before this court for oral argument on November 5, 1990. Both parties had been ordered to show cause why the issues raised by this appeal should not be summarily decided. Defendant is appealing his contempt conviction. The conviction arises out of the defendant's failure to comply with a court decree ordering him to clean up his property. Defendant alleges that the Superior Court judge exceeded his authority in ordering defendant to remove his trailer home and garage from his property, and in enjoining defendant from keeping more than one registered vehicle on the property.

After careful consideration of the arguments and memoranda submitted by the parties, this court finds that cause has not been shown. Accordingly, we summarily decide that the trial judge did not exceed his authority in entering the above order.

Therefore, defendants' appeal is denied and dismissed. The decision of the Superior Court is hereby affirmed.

Entered as an Order of this Court this 16th day of November 1990.

By Order,

/s/ Beverly A. Clark

Matthew J. Smith
Clerk

Mr. Chief Justice Fay did not participate.

APPENDIX G

STATE OF RHODE ISLAND
PROVIDENCE, SC. SUPERIOR COURT

EQUITY NO. 26210

TOWN OF LINCOLN

VS

ARTHUR COURNOYER

DECREE

This matter came on for hearing on February 22, 1990, before Presiding Justice Giannini for the imposition of sanctions to be imposed upon the Defendant, Arthur Cournoyer, based upon the Bench Decision of February 21, 1990; and after hearing arguments of counsel, it is hereby

ORDERED, ADJUDGED and DECREED:

1. Defendant is sentenced to the A.C.I. for a period of six (6) months.

2. Said sentence is suspended upon the following conditions:

A. Defendant is required to clear from that land all vehicles, all parts of vehicles, all tires, all lumber, and all debris. Defendant does not have to clear those trees which might be uprooted and in a natural state.

B. Defendant is to remove anything that is inside the garage.

C. The garage must be removed from the land either by removal of the garage from the land or by the demolition of same with the rubbish and rubble from said demolition removed from the land.

D. Defendant is permitted to retain and drive on the land one vehicle, a 1979 Ford automobile with the present registration number WW 162. No other vehicles are allowed on the land.

E. In the event that it is necessary for Defendant to bring additional vehicles on the land to effectuate the cleanup of the land, the Defendant is directed to call the Special Master, Mr. Little, or his attorney, Charles Rogers, to obtain permission from Presiding Justice Giannini to bring any other vehicles onto the property.

F. The Defendant has until April 30, 1990 to clear the land, demolish or remove the garage and clear everything that is in the garage.

G. The house trailer on the premises must also be removed from the premises by April 30, 1990.

3. This case is continued for further hearing on Thursday, March 1, 1990, provided a Motion is filed by the Defendant prior to that time.

4. The Lincoln Police Department is hereby advised that the only vehicle allowed on the Cobble Hill Road property is a 1979 Ford with registration of WW 162. The Police Department is hereby advised that after March 1, 1990, there are to be periodic and random inspections of that real estate on a daily basis, one of which inspections must be between midnight and 5:00 a.m. The purpose of the inspections is to insure that no vehicles are on the premises other than the 1979 Ford with the registration of WW 162.

5. Mr. Little, Special Master, is directed to arrange to video tape the entire premises including the interior of the garage prior to February 28, 1990. In addition, the entire 30 odd acres must be video taped.

6. The Special Master is directed to go on the land on May 1st and no later than May 5th to video tape the garage, the contents of same and the entire 30 acres of the premises.

7. The Special Master, is hereby directed to arrange for both video tapes to be viewed by the Court on Monday, May 7, 1990.

8. This matter is continued for further hearing on Monday, May 7, 1990, at 10:00 a.m.

9. Nothing contained herein will prevent the Town from moving that the suspension of the 6-months sentence be removed if the Town is of the opinion that this Order has been violated. The Town may present a Motion to have the Defendant adjudged in contempt.

ENTERED as a Decree of this Court this day of February, A.D. 1990.

By Order,

_____

Clerk

ENTER:

_____

JUDGE

APPENDIX H

SUPERIOR COURT OF RHODE ISLAND

EQUITY NO. 26210

TOWN OF LINCOLN

VS

ARTHUR COURNOYER

DECREE

This matter came on for hearing on February 21. 1990, before Presiding Justice Giannini on the Motion filed by the Plaintiff, Town of Lincoln, who adjudged the Defendant in Contempt. On the basis of the findings of fact contained in the Bench Decision of February 21, 1990, it is hereby

ORDERED, ADJUDGED and DECREED:

1. That the Defendant has violated the zoning ordinance of the Town of Lincoln and is in contempt of the Decree of this Court entered on February 18, 1958.

ENTERED as a Decree of this Court this day of February, A.D. 1990.

By order,

ENTER: _____
Clerk

_____

JUDGE

[Excerpts from Transcript of Proceedings of February 21, 1990]

[12] THE COURT: I'm going to discuss this proposal, but before I do, I want to make some comments on statements made by Mr. Rogers on behalf of this respondent. The first statement is that what I heard this morning is in large measure just a rehash of everything I heard in the courtroom. The same arguments have been made. I heard him say that Mr. Little isn't doing anything. It's not for him to judge. That's for me to judge. I have heard him talk about his trailer and where he has to live. I have made a ruling on that. I made a ruling with regard to the garage. I see the garage as the means by which he is able to conduct an illegal business in a residential zone. Now, whether that ruling is correct or not in light of the purported building permit for that garage is another matter. Supreme Court has that. There was evidence in the record that there was no building permit issued, and there is no contradictory evidence to that.

Now, there are a couple of things that were said by Mr. Rogers that I think ought to be said, even though largely it's merely a rehash. This business about the tar-filled trailer and it being the source of a large amount of the $25,000 estimate given to Mr. Little by Metals Recycling, as to that, it doesn't seem to the Court to mean anything that no one has ever moved it. It's Mr. Cournoyer's responsibility to move it. And whether the Town had moved it, and probably spent a large amount of money in doing so, and charged it to Mr. Cournoyer, or if Mr. Cournoyer is responsible to move it and pays a lot of money to do it, or if Mr. Little gets Metals Recycling to do it for a lot of money, it's all going to come out of Mr. Cournoyer's pocket. The fact that it hasn't been moved before doesn't change anything. It's got to be

moved. And whether it was moved in Judge Pettine's order and the costs charged to Mr. Cournoyer, or whether Mr. Cournoyer is required to move it now, it all comes out to the same thing, Mr. Cournoyer is going to pay for it.

With respect to Mr. Cournoyer's inability to clean that place up now because he's in prison, that man was given better than two months to clear it up, and he defied the Superior Court. And now he's claiming that he can't comply because he's incarcerated. That's trying to have it both ways. It's up to him to figrue out a way. The way Mr. Little was able to get hold of Metals Recycling, Mr. Cournoyer can do the same thing. If he's able to use the telephone to talk to reporters, he's able to call Metals Recycling and probably some established junk dealers to find out how to go about doing it. I don't accept the argument that his incarceration prevents him from dealing with people on the outside. I would have to have John Moran, Director of Corrections, tell me that. I would have to have John Moran tell me that people who are incarcerated cannot do business on the outside, if that's a legal business. Unfortunately, there are people who are incarcerated who have no trouble conducting illegal business on the outside.

With regard to this question that it's unreasonable to expect Mr. Cournoyer to clean this area without the use of a couple of trucks, flies absolutely in the face of what the Court said on the record in the courtroom. The Court recognized in entering this order that in addition to the use of that garage, the other means by which Mr. Cournoyer was able to conduct this illegal business was to be able to use a pick-up and a tow truck.

* * *

[22] Now, the cleanup must include everything that is in that garage. That garage is the source of Mr. Cournoyer's violation of this zoning ordinance. If that garage is eliminated, he's not going to have any place to work. But if the Supreme Court says that my ruling in that regard is improper, then at least the material in that garage must be removed, because there is no [23] question in my mind that whatever is in that garage is used to further this illegal conduct of the business.